No. 7885.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
HENRY E. SHERER,
Bankrupt.

V. W. Erickson, as Trustee in Bankruptcy of the Estate of Henry E. Sherer,
Appellant,

vs.

Friend W. Richardson, as Superintendent of Banks of the State of California, and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation,
Appellee.

APPELLANT'S BRIEF.

GRAINGER & HUNT,
Board of Trade Bldg., 111 W. 7th, Los Angeles.
Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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Statutes.

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STATEMENT OF THE CASE.

This is an appeal from an order of the District Court of the Southern District of California affirming an order made by a referee in bankruptcy allowing a general claim filed against the estate for $260,200.00 by Friend W.

Richardson, as superintendent of banks of the state of California, and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation.

STATEMENT OF FACTS.

On January 21, 1935, the above named Henry E. Sherer filed in the above entitled proceeding his voluntary petition in bankruptcy with schedules and was thereupon adjudicated a bankrupt and his case referred to referee in bankruptcy S. W. McNabb for administration. Thereafter V. W. Erickson was appointed and qualified as trustee in bankruptcy.

During the course of the proceedings and within the time limit fixed by section 57-n of the Bankruptcy Act, Friend W. Richardson, as superintendent of banks of the state of California and in charge of the liquidation of the Bank of San Pedro, an insolvent California state banking corporation, filed a general claim against the bankrupt estate in the sum of $260,200.00.

Thereafter the said trustee in bankruptcy filed his written objections to the allowance of the claim and the same were heard and determined by the referee in bankruptcy. On May 9, 1935, the referee in bankruptcy overruled such objections and made and entered his order allowing the claim, and thereupon the trustee in bankruptcy filed with the referee his petition for a review by the judge of the court of such order, and thereafter and on May 13, 1935, the District Court reviewed such order and confirmed the same and granted to said trustee in bankruptcy an exception to such ruling.

The facts were not disputed and a summary of the evidence produced at the hearing is as follows:

On April 24, 1931, the governor of the state of California approved an act passed by the Legislature of the state of California, the same to be in effect on August 13, 1931, which act is known as chapter 196 of the statutes of California, 1931, (Statutes and Amendments to the Codes of California, 1931, page 338) entitled, "An Act to Define the Liability of Stockholders in California State Banks, and to Provide for the Enforcement and Collection of that Liability by the Superintendent of Banks of the State of California." Prior to the bankruptcy of the above named bankrupt, Friend W. Richardson, as superintendent of banks of the state of California and the claimant herein took possession and charge of the assets of the Bank of San Pedro, an insolvent California state banking corporation, and proceeded to liquidate the same and distribute the proceeds among the persons entitled thereto pursuant to the powers vested in him by the laws of the state of California. At the time the superintendent of banks so took possession of such assets, the bankrupt was a stockholder of said banking corporation and the owner of 2602 shares of the common capital stock of said bank of the par value of $100.00 per share, and was such owner for many years prior thereto. Section 1 of said act provides that the stockholders of every California banking corporation are liable, equally and ratably, and not one for another, for all contracts, debts and engagements of said corporation to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. Section 2 of said act provides that when the California Superintendent of Banks takes possession of the business and property of any California banking corporation for the purpose of

liquidating its affairs, he may at any time during the progress of such liquidation, if necessary to pay the debts of such corporation, enforce the individual liability of such stockholders as set forth in said section 1 of said act, and that in order to enforce such liability, he may call for a ratable assessment upon such stockholders, and that any such assessment shall be levied by order of said superintendent of banks under his official seal, which order shall be executed in duplicate, one to be filed in the office of the Superintendent of Banks, and one with the papers in the liquidation proceedings in the county in which said bank shall have been located. Los Angeles is the county in which said bank of San Pedro is located. Prior to bankruptcy herein, no such assessment upon the stockholders or the bankrupt was levied by any order of said Friend W. Richardson, as such superintendent of banks in connection with the liquidation of the affairs of said Bank of San Pedro. About two months after the commencement of the bankruptcy such assessment was levied by the superintendent of banks upon the stockholders of the Bank of San Pedro, including the bankrupt. [Tr. pp. 7-9.]

QUESTIONS PRESENTED.

The sole question in this case is whether or not the claim is a provable debt under section 63-a-4 of the Bankruptcy Act, particularly since no assessment was made by the superintendent of banks prior to the commencement of the bankruptcy proceeding. This question turns upon the problem of whether or not the claim is based upon a statutory liability or upon a contract liability, because if it is a statutory and not a contract liability, then it is not a provable debt within the meaning of section 63 of the Bankruptcy Act.

ARGUMENT.

I.

The Claim Is Based Upon a Statutory and Not a Contract Liability.

It is to be noted that the state banking laws of California with respect to the liability of stockholders of state banks are practically the same as the laws of the United States relating to the liability of stockholders in national banks. The state law, approved by the governor on April 24, 1931, and in effect August 14, 1931, reads as follows (Chap. 196, section 1, Statutes and Amendments to the Codes of California in 1931, page 338):

> "Section 1. The stockholders of every banking corporation organized under the laws of the state of California shall be held individually liable, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The United States law is to be found in section 5234 (a revision of Sec. 5151) of the Revised Statutes of the United States and reads as follows (U. S. C. A., title 12, Sec. 64. See note to Sec. 64 with reference to Sec. 63, which is also R. S. Sec. 5151.)

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock."

The only subdivision of section 63-a of the Bankruptcy Act which could support the claim as a provable debt is subdivision 4, which reads as follows:

> "Debts of the bankrupt which may be proved and allowed against the estate which are . . . founded upon an open account *or upon a contract express or implied.*"

Subdivision 1 of section 63-a obviously does not apply, since the stockholders' liability in the case at bar was not a fixed liability "absolutely owing at the time of the filing of the petition." The Supreme Court definitely held in *Maynard v. Elliot,* 17 A. B. R. (N.S.) 501, 283 U. S. 273, 75 L. Ed. 1028, that the provision of subdivision 1 that the debt must be absolutely owing at the time of the filing of the petition is not to be carried over into subdivision 4 relating to debts founded on contracts express or implied, and that it was sufficient if the debt was fixed in amount or susceptible of liquidation as of the date of the filing of the petition in bankruptcy, although not absolutely owing at that time.

In the case of *Zavelo v. Reeves,* 227 U. S. 625, 29 A. B. R. 493, 57 L. Ed. 676, the Supreme Court laid down the following rule with regard to subdivision 4 of section 63-a:

> "Clause 4 describes simply debts that are 'founded upon an open account, or upon a contract, express or implied,' not in terms referring to the time of the inception of the indebtedness. But, reading the whole of section 63, and considering it in connection with the spirit and the purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under section 63a, cl. 4, include only such as existed at the time of the filing of the petition in bankruptcy."

Our own Circuit Court of Appeals (9th) in the case of *Colman Co. v. Withoft,* 28 A. B. R. 328, 195 Fed. 250, laid down the rule that for a debt to be provable all the facts necessary to be shown to establish the bankrupt's liability to the claimant must have occurred before the petition in banrkuptcy was filed, so that such liability if not fixed in amount as of the date of the filing of the petition in bankruptcy can, at least, be liquidated as of that date (see page 331 of 28 A. B. R.)

We think the question involved in the case at bar as to whether the liability of the bankrupt under the state banking law as a stockholder of the Bank of San Pedro was statutory or contractural is settled by the case of *McClaine v. Rankin,* 197 U. S. 154. That case arose in the state of Washington where section 4800 of the Statute of Limitations of that state provided in respect to the time within which an action might be commenced as follows:

> "Within three years: (subdivision 3) an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

And section 4805 of the same stature provided:

> "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

The receiver of a national bank of that state, contending that the obligation related to an action upon a contract liability, express or implied, and not in writing, commenced an action subsequent to two years and within three years. The defendant claimed that the obligation did not arise out of contract, but was a statutory liability, and that

section 4805 fixing the time within which such action might be brought at two years should prevail, and pleaded the statute of limitations. The Supreme Court in its opinion said:

> "The question must be met whether this is an action brought on a contract or not."

The case was brought to the Supreme Court on a writ of certiorari from the Circuit Court of Appeals for the Ninth Circuit, the latter court having decided (119 Fed. 110) that the action was one based upon an implied contract not in writing and that, therefore, the statutory limitation was three years. The Supreme Court held as follows:

> "Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. If section 5151 had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of section 5151 do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and *statutory*. Brown v. Eastern Slate Company, 134 Massachusetts, 590; Platt v. Wilmot, 193 U. S. 602. In Matteson v. Dent, 176 U. S. 521, the stock still stood in the name of the decedent, and it was decided that the statutory liability was a debt within the state law, but not that it was a true contract.
>
> It is true that in particular cases the liability has been held to be in its nature contractual, but yet it

is nevertheless conditional, and enforceable only according to the Federal statute, independent of which the cause of action does not exist, so that the remedy at law in effect given by that statute is subject to the limitations imposed by the state statute on such actions.

Cases such as Carrol v. Green, 92 U. S. 509, and Metropolitan Railroad Company v. District of Columbia, 132 U. S. 1, are not controlling, for in them the right to recover was direct and immediate and not secondary and contingent."

McClaine v. Rankin, supra, appears to have been approved in principle, with respect to its holding that the liability of the stockholders is statutory and not contractual, in the late case of *Forrest v. Jack,* decided by the Supreme Court on February 4, 1935, (U. S. Supreme Court, L. Ed. Advance Sheets, Vol. 79, No. 7, page 376) where the court refers to title 12, U. S. C. A., section 64, the provision regarding stockholders' liability, and states: "The liability of stockholders is based upon the statute"; and then in Note 1 to such statement refers to *McClaine v. Rankin, supra,* and other cases.

McClaine v. Rankin, supra, was fully discussed and followed by the Circuit Court of Appeals for the Eighth Circuit in a recent case of *Armstrong v. McAdams,* 46 Fed. (2d) 932.

Since the California state banking law involved in the case at bar is practically the same as the Federal law involved in the Supreme Court case of *McClaine v. Rankin, supra,* it seems to us that the Supreme Court decision is controlling and that the liability of the bankrupt in the case at bar is purely statutory and is not founded upon contract. It is a conditional and contingent statutory

liability in that no right to recover accrues, no right of action exists, until the state superintendent of banks levies an assessment; and in the case at bar no assessment was levied prior to bankruptcy, and the bank superintendent did not levy an assessment until some months after bankruptcy had commenced. The order of the superintendent of banks levying the assessment is the basis of the cause of action against the stockholder.

The ruling of the Supreme Court has been followed in subsequent cases and, in particular, in the case of *Christopher v. Norvel,* 201 U. S. 216. In that case a married woman was sued on a stockholder's liability, and it was urged in view of the fact that the law of Florida, from which state the case arose, provided that a married woman cannot bind herself personally by contract at law or in equity, that she could not be held liable. The court in holding that she was liable stated:

> "No implied obligation to contribute to the payment of such debts could arise from the single fact that she became and was a shareholder. Her liability for the debts of the bank is created by the statute, although in a limited sense there is an element of contract in her having become a shareholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, the statute creating liability against each shareholder, in whatever way he may have become such."

The court quoted at length in that case with approval from *McClaine v. Rankin, supra.*

The case of *Page v. Jones* (C. C. A., 8th), 7 Fed. (2d) 541 (writ of certiorari denied, 269 U. S. 587), involved an action brought by Irving Page, receiver of the First National Bank of Lawton, Oklahoma, appointed by the

comptroller of the currency on November 18, 1922, to collect an assessment of $1000.00 made by the comptroller of the currency on January 27, 1923, on the defendant M. F. Jones, the holder of ten shares of the stock of that bank of the par value of $100.00 each, and to enforce his double liability under section 5151 Revised Statutes as amended. (Section 9689 of U. S. Comp. Stat.) Jones defended said action, and in his defense set forth that on December 8, 1921, the bank became insolvent and ceased to do business. One Bernard Ulrich was appointed receiver of it by the comptroller of the currency, and took possession of its property in 1921. Thereafter the receiver so appointed caused the defendant to pay 110% of the par value of his stock, telling him that he would be released of his stockholder's liability. Jones paid the assessment, and in May, 1922, Ulrich turned the bank back to the officers thereof. No assessment had been made by the comptroller of the currency. In November, 1922, the bank was again declared insolvent, and in January, 1922, the comptroller of the currency made an assessment of 100%. The court in holding that the payment by Jones before the assessment was levied by the comptroller did not constitute a defense, said:

> "The double liability of a shareholder of a national bank under section 9689 for the payment of its debts is *entirely statutory*. It attaches, exists and is enforceable and dischargeable at the time, in the manner and for the purpose specified in the act of Congress. It attaches and exists for the purpose of creating a fund for the exclusive purpose of paying the creditors of the bank equably and ratably. DeLane v. Butler, 118 U. S. 634, 7 S. Ct. 39, 30 L. Ed. 260, Scott v. Latimer, 89 Fed. 843, 33 C. C. A. 1."

It was contended that had the obligation been contractual, the payment made by Jones to the first receiver would have assuredly been used to liquidate his obligation under the contract, but the court held that the obligation was *entirely statutory* and a payment made by the stockholder before the assessment was levied by the comptroller effects the liability in no way.

In the case of *Armstrong v. McAdams* (C. C. A. 8th), 46 Fed. (2d) 931, the court in referring to the ruling in *McClaine v. Rankin, supra,* and *Page v. Jones, supra,* and following that rule, calls particular attention to the fact that the court said the liability is entirely statutory.

II.

The Claim Is Conditional and Contingent and, Therefore, Not Provable.

While the Supreme Court held in *Maynard v. Elliot,* 17 A. B. R. (N. S.) 501, 283 U. S. 273, 75 L. Ed. 1028, that some contingent claims were provable where they were, at least, susceptible of liquidation as of the date of the filing of the petition in bankruptcy, it also held that those claims dependent upon a contingency so uncertain as to make impossible a liquidation of the valuation as of the date of bankruptcy were not provable. Still, the claim in the case at bar, even though it were based upon a contract liability and not upon a statutory liability, would be a claim based upon a contingency so remote as to be incapable of proof: a claim dependent upon an event so fortuitous as to make it uncertain whether or not liability will ever attach. If the superintendent of banks, in the case at bar, never did order an assessment, then obviously no claim would ever arise, nor would any liability ever attach. The superintendent of banks had absolute discretion whether to order an assessment or not.

Conclusion.

We contend that the reasoning of the Supreme Court in *McClaine v. Rankin, supra,* is such that it must be held that the claim in the case at bar is based entirely upon a statutory liability and is not in any sense based upon a contract express or implied, that it is conditional and contingent, and that, therefore, it is not a provable debt within the meaning of section 63 of the Bankruptcy Act, and that, therefore, the order of the lower court must be reversed and the claim disallowed.

GRAINGER & HUNT,

Attorneys for Appellant.